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No. 88-526

In The

Supreme Court of the United States

October Term, 1988

SHEARN MOODY, JR.,

Petitioner,

vs.

EMPIRE LIFE INSURANCE COMPANY
AND JOHN S. GREENO,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether review by the Court of Appeals was proper under 28 U.S.C. 1291 following an order of severance by the District Court under Fed. R. Civ. P. Rule 21 which left all issues in the action resolved.

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OPINION BELOW

The opinion of the Fifth Circuit Court of Appeals is reported at 849 F.2d 902 and is attached to Petitioner's appendix at page 1a.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit (the "Petition").

STATUTES AND RULES OF PROCEDURE INVOLVED

28 U.S.C. 1291 provides in pertinent part:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Fed. R. Civ. P. 21 provides:

> Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

Fed. R. Civ. P. 54(b) provides in pertinent part:

> Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and

direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Sup. Ct. R. 17 provides in pertinent part:

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

COUNTERSTATEMENT OF THE CASE

Petitioner Shearn Moody, Jr. ("Petitioner" or "Moody") is the Debtor in a Chapter 11 bankruptcy reorganization case pending in the United States District Court for the Southern District of Texas, Houston Division. Moody formed Empire Life Insurance Company of America ("Empire") in June, 1963 under Alabama law. Moody was the majority shareholder as well as the President and Chairman of the Board from Empire's inception until Empire was declared insolvent and placed in receivership by order of the Circuit Court of Jefferson County, Alabama in 1972.

The Receiver for Empire (the "Receiver")[1] filed a Proof of Claim in the Moody bankruptcy case based upon a judgment entered against Moody in favor of the Receiver in a prior action, *Meyers v. Moody*, 475 F.Supp. 323 (N.D. Tex. 1979), *aff'd*. 693 F.2d 1196 (5th Cir. 1982), *cert. denied* 464 U.S. 920 (1983). Moody instituted an adversary proceeding in connection with his pending bankruptcy case (i) objecting to the Receiver's claim and (ii) seeking to set aside judgment liens securing the Receiver's claim.

The Receiver obtained partial summary judgment allowing its claim in the adversary proceeding on February 18, 1987 pursuant to an Order Granting Partial Summary Judgment (the "Summary Judgment Order"). Thereafter, *with Moody's consent*, the District Court severed the issue of the validity of the Receiver's claim from the remaining undetermined issues as to the validity of judgment liens securing the Receiver's claim. The severance was made at the request of the Receiver for the specific purpose of allowing the determination of the validity of the Receiver's claim to become a final judgment immediately appealable.

Following the entry of the severance order, Moody filed an appeal to the Fifth Circuit Court of Appeals ("Fifth Circuit") challenging the grant of summary judgment. Later, during the course of the appeal to the Fifth

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[1] John S. Greeno is nominally a party to this action as he was the receiver of Empire at the time of the District Court's judgment. The term "Receiver" is used without distinguishing between successive receivers for Empire including the current receiver, Mr. Nelson Burnett.

Circuit, Moody raised a jurisdictional issue claiming that the severance order did not render the Summary Judgment Order a final order within the meaning of 28 U.S.C. 1291.

The Fifth Circuit reached the merits of the controversy, affirming the District Court's judgment. The Fifth Circuit rejected Moody's argument that the allowance of the Receiver's claim and the challenge to the validity of the judgment liens were so closely intertwined that the issues had to be jointly considered. The Fifth Circuit stated that Moody's argument failed to recognize its prior holding in the case *Smith v. Revie (In re Moody)*, 817 F.2d 365, 368 (5th Cir. 1987). In that case the Fifth Circuit held that "a bankruptcy proceeding is over when an order has been entered that ends a discrete judicial unit in the larger case." Further, the Fifth Circuit agreed with the First Circuit in holding that "as long as an order allowing a claim or priority [in a bankruptcy proceeding] effectively settles the amount due the creditor, the order is 'final'." *In re Saco Local Development Corp.*, 711 F.2d 441, 448 (1st Cir. 1983).

REASONS FOR DENYING THE WRIT

The Petition sought by Moody should be denied on two specific grounds. One is that no important ground for granting certiorari exists, and the second is that the Fifth Circuit correctly decided this case on the merits.

Supreme Court Rule of Procedure Rule 17 notes that review by writ of certiorari is not a matter of right, but of judicial discretion. Therefore, certiorari is only granted in

cases where there are special and important reasons for Supreme Court review. Special and important reasons "imply a reach to a problem beyond the academic or the episodic", *Rice v. Sioux City Memorial Hospital Cemetery, Inc.*, 349 U.S. 70, 74 (1955). Further, certiorari should not be granted "except in cases involving principals the settlement of which is of importance to the public, as distinguished from that of the parties. . . ." *Id.* at 79.

The Petition filed by Moody presents no important issue of federal law. In addition, no conflict between federal courts, state courts, or prior decisions of the Supreme Court is in question here. The only problem that Moody envisions in his argument for certiorari is that severance of separate claims which renders a resolved claim immediately appealable creates a possibilty of "evasion of the finality requirement and the strictures of [Federal Rule of Civil Procedure] Rule 54(b)." (Petition, p. 10). The Petition does not state that the evasion of Rule 54(b) it envisions has ever occurred, much less that it is occurring with any dangerous frequency. Furthermore, Petitioner does not even explain why such an evasion would merit concern. In fact, Moody seems to argue that the District Court certainly could have made immediate appeal proper by making a certification under Rule 54(b) but failed to follow the proper procedure. If the same result could have been obtained by a different procedure, then this case can hardly constitute an infringement of a basic federal interest. At best, the issue raised by Petitioner is purely episodic and important only to the litigants involved. Thus, Supreme Court review is unwarranted.

Nor is the decision of the Fifth Circuit herein in conflict with decisions of this Court or decisions of other circuit courts. The basic thrust of Petitioner's argument is that the allowance of the Receiver's claim was not appealable under 28 U.S.C. 1291 because it was not "final". Moody admits that prior decisions of the Fifth Circuit determine "finality for purposes of appellate jurisdiction more flexibly in the context of bankruptcy cases than in ordinary civil proceedings", *Smith v. Seaside Lanes (In re Moody)*, 825 F.2d 81, 85-86 (5th Cir. 1987) (Petition, p. 8). The current and prior decisions of the Fifth Circuit are consistent with decisions of at least one other circuit court. "Congress has long provided that orders in bankruptcy cases may be immediately appealed if they finally dispose of *discrete disputes within the larger case* – and in particular, it is long provided that orders finally settling creditors' claims are separately appealable". *In re Saco Local Development Corp.*, 711 F.2d 441, 444 (1st Cir. 1983) (emphasis in original).

Additionally, Petitioner misreads the purpose of Rule 54(b) and misapplies Rule 54(b) and the finality test to the underlying facts here. Petitioner repeatedly states that the District Court failed to certify the Receiver's claim under Rule 54(b) as an interlocutory order which was appealable. Following the severance, the only issue in the adversary proceeding was the allowability of the Receiver's claim. That issue having been decided, no issue remained for the Court to pass upon. Rule 54(b) holds, in salient part, "*Where more than one claim for relief is presented in an action*, the Court may direct the entry of final judgment as to one or more but fewer than all of the claims of parties only upon an expressed determination

that there is no just reason for delay and upon an expressed direction for the entry of the judgment." (emphasis added). Clearly, Rule 54(b) requires certification only if more than one claim for relief is presented in an action. But that indisputably is not the case here.

The District Court has authority pursuant to Federal Rules of Civil Procedure Rule 21 to sever any claim and proceed with it separately. The order severing the Receiver's claim, which allowed it to continue as a separate matter, was proper, leaving only one claim for relief involved in the adversary proceeding appealed from by Moody. As all issues in that adversary proceeding had been resolved, Rule 54(b) was inapplicable and the Receiver's claim was appealable as final under 28 U.S.C. 1291. Petitioner's belabored misunderstanding of this simple, straightforward procedure is as unfathomable as his contrived fear of a "wholesale evasion" of Rule 54(b).

Therefore, as no special or important issue affecting the public is raised by the Petition and the Fifth Circuit's decision is correct, the Petition should be denied.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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